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INTEREST OF THE *AMICI CURIAE*

Amici are professors and scholars of law expert in the fields of international law, international dispute settlement, and the application of international law by courts in the United States.[1] (A List of *Amici* is set forth in the Appendix.) *Amici* are experienced in the work of international tribunals, notably the International Court of Justice (ICJ), and include former officials of the U.S. Department of State who have represented the United States at the ICJ. *Amici* seek to present their views concerning the significance of final judgments of the ICJ interpreting a treaty of the United States in proceedings in which the United States participated fully, and the respect that should be accorded to the ICJ's treaty interpretation by all courts in the United States, in the context of petitions for review and reconsideration of convictions of serious crimes (such as murder) entailing severe penalties.

Amici limit their submission to issues of the ICJ's interpretation of the treaty and rights that individuals may assert under it in domestic courts; they do not address the factual basis for petitioners' claims. *Amici* are united in the view that ICJ judgments interpreting the treaty, rendered in cases to which the United States was party, supply the basis for rules of decision for courts in the United States to which claims under the treaty may be presented; that state courts are required to apply the treaty as interpreted by the ICJ; that state procedural default rules cannot foreclose the exercise of treaty rights to a hearing as held by the ICJ; and that petitioners have the right to present their treaty-based claims before the courts of Oregon and Virginia.

SUMMARY OF ARGUMENT

These consolidated petitions present questions concerning the remedies to be accorded by state courts for violations of the Vienna Convention on Consular Relations, in light of authoritative rulings by the International Court of Justice on the meaning of the Convention and how the United States is

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[1] No party other than *Amici* and their counsel authored this brief in whole or in part, and no person or entity, other than *Amici* and their counsel, has made a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this *amicus curiae* brief are on file with the Clerk of the Court.

required to apply it. This Court's disposition in *Medellin v. Dretke*, 125 S.Ct. 2088 (2005), left undecided the underlying issue of the reception into the U.S. legal system of the ICJ's decisions interpreting the treaty.

The Oregon and Virginia courts denied any remedy to either petitioner, on the basis of erroneous views that the treaty does not create individual rights enforceable in a domestic judicial proceeding and that state procedural rules can foreclose a well-founded treaty claim. In part, the error of the courts below was based on what they understood to be the import of *Breard v. Greene*, 523 U.S. 371 (1998), which in turn was based on assumptions that had not had the benefit of plenary briefing, at a time when the ICJ had not yet ruled on questions of treaty interpretation that were properly presented to it. Subsequent to *Breard*, the ICJ has clarified the nature of the rights invocable under the treaty, the treaty-based requirement of a judicial remedy for their violation, and the proper relationship between the rights guaranteed by the treaty and the procedural framework for their exercise under local law. This Court should now revisit its *Breard* conclusions and instruct the lower courts to allow petitioners to present their treaty claims to the appropriate judicial bodies, free of any misconceptions about the treaty-based rights and remedies at issue and of the procedural obstacles that the ICJ has determined to constitute impediments to the exercise of treaty rights.

The ICJ's *LaGrand* and *Avena* decisions constitute the authoritative interpretation of the Vienna Convention as regards nationals of treaty parties who have been sentenced to severe penalties without having been informed of their treaty rights. The rights in question derive from the treaty itself; *LaGrand* and *Avena* clarify the nature and content of those rights and the treaty-based remedies for their enforcement. (Section I.)

LaGrand and *Avena* resulted from a treaty-based dispute settlement process to which the United States fully consented, in which the United States fully participated, and which produced an interpretation of the Vienna Convention that removes any doubt about the obligations of the United States

as a whole toward nationals of treaty parties. The Vienna Convention as interpreted in *LaGrand* and *Avena* binds state authorities; the treaty obligations in question are directed to procedural matters addressed in the ordinary course by domestic courts; and state courts are required by the Supremacy Clause of the Constitution to exercise their judicial powers within their respective jurisdictions to carry out these obligations of the United States. (Section II.)

This Court should endorse as the federal rule of decision the interpretation of the treaty that has now been twice confirmed by the ICJ in cases to which the United States was a party. There is no basis for state courts to continue to follow an Executive Branch litigation position that has been displaced by the appropriate international dispute settlement process to which the United States committed itself in a constitutionally proper way. (Section III.)

The Vienna Convention as interpreted in *LaGrand* and *Avena* does not require Oregon or Virginia to set petitioners free or to refrain from carrying out their sentences, if the courts below were to find after a hearing that the treaty violations had not affected petitioners' ability to defend themselves. What the Convention requires is a judicial forum in which petitioners can have a hearing on their claims that they suffered actual prejudice from the treaty violations – violations neither Oregon nor Virginia has denied. This Court should therefore remand for hearings in which petitioners' treaty claims could be examined on their merits. In the case of petitioner Sanchez-Llamas, the Oregon courts should reexamine his case, informed by the *LaGrand* and *Avena* interpretation that the treaty establishes judicially enforceable individual rights. In the case of petitioner Bustillo, the Virginia courts should remove the barrier of the state procedural default rule, which was applied in a way that the ICJ has found to be inconsistent with treaty rights.

ARGUMENT

I. The ICJ Has Authoritatively Determined The Interpretation And Application Of The Vienna Convention For Purposes Of The Questions Presented In These Petitions.

The courts below based their denials of relief on incorrect assumptions about the interpretation of the Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820, 596 U.N.T.S. 261 [Vienna Convention] and its application as a controlling source of law for state courts. The Oregon court in No. 04-10566 adopted the position that the Vienna Convention does not confer individual rights enforceable in judicial proceedings; the Virginia court in No. 05-51 held that a state procedural default rule could be applied to foreclose a Vienna Convention claim. These positions have now been definitively rejected by the International Court of Justice [ICJ].[2] Since petitioners are covered by the Vienna Convention (Section I.A), they are entitled to benefit from the ICJ's construction concerning judicially enforceable individual rights (Section I.B) and procedural default (Section I.C), and are entitled to the same treaty-based remedy as the ICJ held to be required for the individuals covered by *LaGrand* and *Avena* (Section I.D).

A. Petitioners Are Foreign Nationals Covered By The Vienna Convention Whose Rights Under The Convention Were Violated.

Petitioners are foreign nationals from states parties to the Vienna Convention, which provides in Article 36(1)(b) that if such a national is arrested or detained, he shall be informed

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[2] No decision of this Court should have been understood as standing in the way of full implementation of the ICJ's authoritative interpretation. *Breard v. Greene*, 523 U.S. 371 (1998), left open the possibility that the Vienna Convention entails judicially enforceable individual rights, *see* 523 U.S. at 376 (treaty "arguably confers on an individual the right to consular assistance following arrest"), but concluded that such rights, if they exist, could be cut off by a later-in-time federal statute, which is not involved here. In *Medellin v. Dretke*, 125 S.Ct. 2088, 2091 n. 3 (2005), this Court noted that the ICJ had held in *Avena* that the Vienna Convention does establish individually enforceable rights. *Breard* did not address the situation of state rather than federal procedural default rules, an issue now pending in Texas in the *Medellin* matter.

"without delay of his rights" to have his consular post notified and to communicate with the consulate. The obligations of parties to the Vienna Convention have been interpreted several times in cases involving the United States brought under the Optional Protocol to the Vienna Convention Concerning the Compulsory Settlement of Disputes, April 24, 1963, 21 U.S.T. 325. T.I.A.S. No. 6820, 596 U.N.T.S. 487 [Optional Protocol], including in *LaGrand* (F.R.G. v. U.S.), 2001 ICJ 466, and *Avena and Other Mexican Nationals* (Mex. v. U.S.), 2004 ICJ No. 128. *LaGrand* held that the Vienna Convention does establish rights for individuals, that procedural default rules must not be applied to prevent the exercise of treaty rights, and that the remedy for violations of Article 36 consists in the obligation of the United States to provide, by means of its own choosing, review and reconsideration of the convictions and sentences of affected individuals. *Avena* confirmed these conclusions and further specified that the remedy of review and reconsideration is to be carried out in judicial proceedings. (Sections I.B, I.C.) *LaGrand* and *Avena* likewise held that the requirement of review and reconsideration applies as a matter of interpretation of the Vienna Convention not only in the cases of the individuals named in the judgments, but also in other cases under the treaty entailing "severe penalties." (Section I.D.)

Petitioner in No. 04-10566, Moises Sanchez-Llamas, is a national of Mexico who was convicted in Oregon of 11 felony counts, including attempted murder and assault in the first degree, and sentenced to 246 months' imprisonment – undoubtedly "severe penalties" under *LaGrand* and *Avena*. He was advised of his *Miranda* rights in Spanish and English but not notified of his right to contact the Mexican consulate before he confessed. Prior to trial, he moved to suppress his confession because of the Vienna Convention violation. The denial of this motion was upheld by the Supreme Court of Oregon on the ground that the Vienna Convention does not provide for judicially enforceable individual rights. *Oregon v. Sanchez-Llamas*, 338 Ore. 267, 108 P.3d 573 (2005). This position is inconsistent with the ICJ's decision in *Avena* that the Vienna Convention does establish individual rights and that the

proper remedy under the treaty for violation of those rights is to be determined in a judicial hearing. (Section I.B.)

Petitioner in No. 05-51, Mario A. Bustillo, is a national of Honduras - a country which, like Mexico, is party to the Vienna Convention. He was convicted of murder and sentenced to 30 years' imprisonment - unquestionably "severe penalties" - without awareness of his consular rights. He claims that the crime was actually committed by another Honduran national who fled to Honduras, and he has introduced a declaration from the Honduran consulate to the effect that it would have been able to help him identify that individual and obtain potentially exculpatory evidence if he had had consular access prior to trial. The Virginia courts denied relief on the ground of procedural default, because he had not raised his Vienna Convention claim at trial. App. to Pet. for Certiorari, pp. 20a, 40a, 44a, 47a. This denial is inconsistent with the ICJ's holding that procedural default rules (while not invalid *per se*) must not be applied to foreclose a judicial hearing on a claim that failure to inform a defendant of his treaty rights had prevented him from asserting them and that he had suffered prejudice from that failure. (Section I.C.)

B. The *LaGrand* And *Avena* Judgments Establish That The Vienna Convention Confers Individual Rights To Be Enforced In Domestic Judicial Proceedings.

In *LaGrand* (paras. 75-77), the ICJ laid to rest all debate about the nature of the Vienna Convention rights in question as rights of the individual concerned. The ICJ specifically rejected the U.S. contention (para. 76) that the rights at issue are rights of states and not of individuals, concluding (based on the text of the provisions in context) "that Article 36, paragraph 1, creates individual rights."[3] In *Avena*, the ICJ reaffirmed its *LaGrand* conclusion on individual rights and additionally observed (para. 40) "that the individual rights of Mexican nationals under [Article 36(1)(*b*)] are rights which are to be asserted, at any rate in the first place, within the

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[3] *LaGrand*, para. 77; *see also* paras. 38, 42, 74, 78, 126, and *Avena*, paras. 35, 40, 124, 139-140 (on the contentions of Germany and the United States concerning individual rights).

domestic legal system of the United States."[4] The ICJ explained that these "are treaty rights which the United States has undertaken to comply with in relation to the individual concerned, irrespective of the due process rights under United States constitutional law" (para. 140), thereby recognizing that an individual's treaty right to consular assistance is analytically and practically different from constitutional rights.[5]

Avena specified further that a judicial hearing is required to redress violations of these treaty-based individual rights. The ICJ expressly rejected the U.S. contention that nonjudicial remedies such as clemency could satisfy treaty requirements and explained the need for a judicial remedy within the individual's own criminal proceedings as an interpretation of Article 36.[6] This aspect of *Avena* crucially locates the remedial dimension *as a matter of interpretation and application of the Vienna Convention itself.* As the United States has stated in the past (referring to ICJ treaty cases), the question of remedy for a treaty violation is itself a question of treaty law:

> The Court's jurisprudence establishes that "the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation

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[4] This observation responded to the U.S. position that Mexico's ICJ application should be considered inadmissible as to any Mexican national who had not exhausted all remedies in U.S. courts. The U.S. assertion before the ICJ that there might be remedies remaining to be exhausted in the U.S. legal system was in tension with the U.S. position at the ICJ – and in U.S. domestic courts – that the treaty did not create judicially enforceable rights. The ICJ has rejected this position as a matter of treaty interpretation, and this Court should reject it as well. *See* Section III.

[5] Petitioner Bustillo's case is an apt illustration of this proposition. Consular services from the government of Honduras could have helped him obtain immigration records and other official documents concerning another Honduran national – assistance beyond the power of his own counsel or any U.S. state or federal authority to provide.

[6] *See Avena*, paras. 121 (remedy for Article 36 violation to be carried out "by the United States courts"), 122 (question of prejudice "is an integral part of criminal proceedings before the courts of the United States"), 127 (legal consequences of breach "to be examined under the concrete circumstances of each case by the United States courts concerned"), 140 ("it is the judicial process that is suited to this task"), 141 (review and reconsideration "should occur within the overall judicial proceedings relating to the individual defendant concerned").

> therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself." (*Factory at Chorzów, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9*, p. 21; see also *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, p. 174, at p. 184.)

Memorial of the Government of the United States of America, *United States Diplomatic and Consular Staff in Tehran* (U.S. v. Iran),1979 ICJ Pleadings 121 at 188.

C. The ICJ Has Held That Applications Of The Procedural Default Rule To Prevent Adjudication Of Whether An Individual Has Been Prejudiced By A Treaty Violation Are Incompatible With The Treaty.

In both *LaGrand* and *Avena*, the ICJ addressed in detail the U.S. position that procedural default rules could foreclose presentation of treaty claims and gave a reasoned explanation for not accepting that position.[7] The ICJ concluded that while the procedural default rule in itself does not violate Article 36, particular applications of the rule can violate the Convention, namely when a breach of Article 36(1) through failure to inform the individual of his rights precluded the exercise of his or his country's treaty rights.

As with the ICJ's treatment of the question of judicial remedy (Section I.B), the issue of application of the procedural default rule is itself a question of treaty law – specifically of interpretation and application of Article 36(2) of the Vienna Convention, which provides that the domestic framework for exercise of treaty rights "must enable full effect to be given to the purposes for which the rights accorded under [Article 36] are intended." In *Breard*, this Court assumed that the mention in Article 36(2) of "the laws and regulations of the receiving State" validated the operation of rules of procedural default in U.S. habeas jurisprudence, but that assumption was made

[7] *See LaGrand*, paras. 50, 58-60, 79-91, 125, 128(7); *Avena*, paras. 111-113, 133-134, 138. In *Avena*, the treatment of procedural default and related questions comes under the general heading of "Article 36, paragraph 2," beginning at para. 107 of the judgment.

without benefit of full briefing on whether such rules "enable full effect to be given" to Article 36's purposes. The matter was later considered in a full adversarial posture in *LaGrand* and *Avena*, and the ICJ's decisions in those cases have undercut this Court's assumption in *Breard*. As on other occasions when this Court has had drawn to its attention materials relevant to the proper international interpretation of a treaty, it would be appropriate for this Court to reconsider and revise its previous conclusions with attention to the ICJ's treatment.[8]

D. The ICJ Has Held That The Remedy Required By The Vienna Convention For Violations Is Review And Reconsideration Of Convictions And Sentences In Circumstances Like Those Of Petitioners, Involving "Severe Penalties."

At the ICJ merits phase of *LaGrand*, review and reconsideration of the convictions and sentences of the particular individuals was impossible, since the LaGrand brothers had been executed. Nonetheless, Germany drew to the ICJ's attention the fact that other German nationals were or could be similarly situated and asked the ICJ to frame its judgment with such cases in view. *LaGrand*, paras. 117-125. In that regard, the ICJ reasoned that an apology would not suffice where individuals "have been subjected to prolonged detention or convicted and sentenced to severe penalties" (para. 125) and addressed the remedies for such individuals in the last dispositive paragraph of the judgment.[9] Similarly, in *Avena*, Mexico made the ICJ aware that beyond the specific

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[8] *Cf. United States v. Percheman*, 32 U.S. (7 Pet.) 51, 88-89 (1833) (revisiting treaty question decided in *Foster & Elam v. Neilson*, 27 U.S. (2 Pet.) 253 (1829), after receiving translated Spanish text). In light of the ICJ's view of U.S. treaty obligations, a *Charming Betsy* analysis of the later-in-time federal statute (not involved in the present cases) might be appropriate if the statute involved in *Breard* reaches this Court again.

[9] *LaGrand*, para. 128(7) (adopted 14-1):

> *Finds* that should nationals of the Federal Republic of Germany nonetheless be sentenced to severe penalties, without their rights under Article 36, paragraph 1(*b*) of the Convention having been respected, the United States of America, by means of its own choos ng, shall allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in that Convention.

individuals on whose behalf it brought the case, treaty violations continued to occur and other Mexican nationals whose rights had been violated were at various stages of criminal proceedings; Mexico therefore asked for the judgment to protect those and any future Mexican nationals in comparable situations. *See Avena*, para. 146 (referring to at least 100 cases in first half of 2003 in which Mexican nationals had been arrested for serious felonies without timely notice of their consular rights). The ICJ addressed Mexico's request in the last dispositive provision of the judgment,[10] and by a paragraph in its reasoning explaining the obligations of the United States flowing from the treaty itself and applying to all nationals of treaty parties:[11]

> 151. The Court would now re-emphasize a point of importance. In the present case, it has had occasion to examine the obligations of the United States under Article 36 of the Vienna Convention in relation to Mexican nationals sentenced to death in the United States. Its findings as to the duty of review and reconsideration of convictions and sentences have been directed to the circumstance of severe penalties being imposed on foreign nationals who happen to be of Mexican nationality. To avoid any ambiguity, it should be made clear that, while what the Court has stated concerns the Mexican nationals whose cases have been brought before it by Mexico, the Court has been addressing

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[10] *Avena*, para. 153 (11) (adopted unanimously):

> *Finds* that, *should Mexican nationals nonetheless be sentenced to severe penalties*, without their rights under Article 36, paragraph 1(*b*), of the Convention having been respected, the United States of America shall provide, by means of its own choosing, review and reconsideration of the conviction and sentence, so as to allow full weight to be given to the violation of the rights set forth in the Convention, taking account of paragraphs 138 to 141 of this Judgment. [Emphasis added.]

[11] To similar effect, see Declaration of President Guillaume in *LaGrand*, 2001 ICJ at 517 ("in order to avoid any ambiguity, it should be made clear that there can be no question of applying an *a contrario* interpretation to this paragraph."). On the import of *LaGrand* and *Avena* for nationals of states other than Germany and Mexico, see Section III.A.

> the *issues of principle* raised in the course of the present proceedings *from the viewpoint of the general application of the Vienna Convention*, and there can be no question of making an *a contrario* argument in respect of any of the Court's findings in the present judgment. In other words, the fact that in this case the Court's ruling has concerned only Mexican nationals cannot be taken to imply that the conclusions reached by it in the present Judgment do not apply to *other foreign nationals* finding themselves in similar situations in the United States. [Emphasis added.]

Petitioner Sanchez-Llamas, as a Mexican national sentenced to severe penalties, is without doubt comprehended within both paragraph 151 and dispositive paragraph 153(11) of *Avena*; petitioner Bustillo is surely one of the similarly situated "other foreign nationals" under the ICJ's authoritative interpretation of the Vienna Convention.

II. *LaGrand* And *Avena* Resulted From A Treaty-Based Dispute Settlement Process To Which The United States Agreed, In Which The United States Participated Fully, And Which Specifies Treaty Obligations For The United States As A Whole.

Amici respectfully emphasize the fully consensual nature of the obligations undertaken by the United States in adhering to the Vienna Convention and Optional Protocol. The Optional Protocol serves as a forum selection clause, with the effect that parties that have selected the ICJ as the forum to decide their disputes are bound to carry out its decisions.[12] Thus, once having given consent to both the Vienna Convention and the designated forum for dispute settlement, the United States is obligated to comply with the Convention, as interpreted by the ICJ.

A. The Vienna Convention Establishes Uniform Consular Standards.

The Vienna Convention codifies into multilateral treaty law a body of rules that evolved over centuries. Before the

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[12] *Cf. Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 8-9 (1972); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 629 (1985) (enforcing arbitration agreement).

Vienna Convention, disputes over consular relations frequently led to diplomatic protests and international arbitration.[13] By the mid-20th century, the desirability of a multilateral treaty to codify consular law and provide for settlement of consular disputes was clear. Treaty codifications of customary international law produce greater certainty and enjoy a clearer status than custom in many legal systems. A multilateral mechanism for binding settlement of consular disputes would likewise strengthen compliance and obviate the need for special arbitration agreements.

Codification of consular law was undertaken by the U.N. International Law Commission and a diplomatic conference. *See* 1961-II Y.B. INT'L L. COMM'N 88-128. The United States played a leading role in negotiating the specific wording of Article 36 of the Convention and the Optional Protocol. *See* Report of the United States Delegation to the Vienna Conference on Consular Relations, *reprinted in* Sen. Exec. E, 91st Cong., 1st Sess., May 8, 1969, at 41, 59-61 [Report of U.S. Delegation]. The United States actively advocated the provision that became the Optional Protocol and resisted others' efforts to eliminate or weaken dispute settlement. *See* Report of U.S. Delegation at 72-73. The formulation from the Vienna Conference, fully supported by the United States,

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[13] *See* 4 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 830-837 (1942) [Hackworth]; M. WHITEMAN, DIGEST OF INTERNATIONAL LAW, vol. 7 at 626-658; vol. 8 at 807-837 (1970). In the 1920s, a U.S.-Mexican claims commission held that "a foreigner, not familiar with the laws of the country where he temporarily resides, should be given [the] opportunity" of consular access. *Walter H. Faulkner* (U.S. v. Mex.), Opinions of the Commissioners Under the Convention Concluded September 8, 1923 (1927) at 86, 90; *see also* 4 Hackworth 830. Conversely, where California officials did not give the Mexican consulate access to a detained Mexican citizen, the Department of State stressed the importance of California's compliance with standards maintained by the United States in its dealings with other countries:

> Even in the absence of applicable treaty provisions this Government has always insisted that its consuls be permitted to visit American citizens imprisoned throughout the world and it is believed that if [the] attitude [of the] District Attorney is maintained in [the] instant case there will be repercussions in Mexico and perhaps other countries unfavorable to American citizens.

4 Hackworth 836.

was an Optional Protocol that states would be free to accept or not; upon acceptance, a binding obligation would be created. *Ibid.* The United States voluntarily accepted the Optional Protocol when it ratified the Vienna Convention in 1969.[14]

No state can unilaterally determine the meaning of an international treaty.[15] Thus, in a dispute over the interpretation and application of the Vienna Convention, the United States cannot impose its own view on its treaty partners,[16] or establish the measure of its own treaty compliance. Nor can disputes over the application of the Vienna Convention to particular facts, or over the remedy for breach, be determined by the United States as one party to the dispute.

B. The United States Consented To ICJ Jurisdiction To Decide Disputes Under The Vienna Convention And Is Therefore Required To Give Effect To The Resulting Interpretation Of The Disputed Treaty Provisions.

The United States freely agreed to the compulsory jurisdiction of the ICJ to resolve Vienna Convention disputes, and thus voluntarily accepted an obligation to give effect to the ICJ's interpretation resulting from the dispute settlement procedure. The basis for ICJ compulsory jurisdiction is Article I of the Optional Protocol.[17] The jurisdiction of the ICJ in

[14] On March 7, 2005, the United States gave notice of withdrawal from the Optional Protocol. (Section II.C.)

[15] *See Jesse Lewis (The David J. Adams) Claim* (U.S. v. Gr. Br., 1921), 6 U.N. Rep. Int'l Arb. Awards 85 (British court decision could not be conclusive of meaning of U.S.-British treaty; arbitral tribunal had competence to interpret the treaty authoritatively). *See also Mitsubishi*, 473 U.S. at 629; *Bremen*, 407 U.S. at 9 (U.S. courts should not "insist on a parochial concept that all disputes must be resolved under our laws and in our courts. ... We cannot have [international dealings] exclusively on our terms, governed by our laws, and resolved in our courts.").

[16] For this reason, U.S. courts ought to give careful consideration to reasoned positions adopted by foreign or international as well as U.S. courts on points of treaty interpretation. *Cf. Olympic Airways v. Husain*, 540 U.S. 644, 660-661 (2004) (Scalia, J., dissenting). Where a tribunal has been accepted by the U.S. political branches as the forum for binding settlement of treaty disputes, deference to its conclusions is not just advisable but required as a matter of treaty law.

[17] Article I states: "Disputes arising out of the interpretation or application of the [Vienna] Convention shall lie within the compulsory

(Cont'd)

LaGrand and *Avena* was founded on consent and reciprocity under Article 36(1) of the ICJ Statute, which establishes jurisdiction over "all matters specially provided for ... in treaties and conventions in force." At all times relevant to *LaGrand* and *Avena*, the Optional Protocol was a treaty in force under Article 36(1) of the ICJ Statute. Because the United States consented through the proper processes under domestic and international law to submit Vienna Convention disputes to ICJ jurisdiction, it is required to implement the outcome of the procedure.[18]

The United States was the first state to turn to the ICJ in a Vienna Convention dispute, when it brought an application against Iran concerning U.S. diplomatic and consular personnel held hostage in Tehran in 1979. *See United States Diplomatic and Consular Staff in Tehran* (U.S. v. Iran), 1979 ICJ 7, 1980 ICJ 3, 5, 24-26. The U.S. pleadings in that matter analyze the obligation of parties to the Optional Protocol when disputes arise to abide by ICJ decisions. *See* 1979 ICJ Pleadings, *United States Diplomatic and Consular Staff in Tehran*, at 141-152.[19] When the ICJ indicated provisional measures in 1979 and entered judgment in 1980, the United States insisted on Iranian compliance and invoked the ICJ's decisions in U.S. and foreign tribunals.

(Cont'd)

jurisdiction of the International Court of Justice and may accordingly be brought before the Court by a written application made by any party to the dispute being a Party to the present Protocol."

[18] *See* U.N. Charter, 59 Stat. 1031, art. 94 ("Each Member of the United Nations undertakes to comply with the decision of the [ICJ] in any case to which it is a party.").

[19] The availability of the ICJ to the United States in that case differed from the situation prior to the Vienna Convention, when the United States was unable because of the lack of jurisdictional consent to bring disputes over consular access to an authoritative tribunal. In 1954 the United States filed an ICJ case against Hungary claiming denial of consular access to four U.S. airmen who were tried in Hungary after their plane was brought down. 1954 ICJ Pleadings, *Treatment in Hungary of Aircraft and Crew of the United States of America* (U.S. v. Hung.), at 19-20, 31, 35-36. The case was dismissed because Hungary had not consented to ICJ jurisdiction. 1954 ICJ 99. Hungary is now party to the Vienna Convention and the Optional Protocol.

Approximately 70 U.S. treaties now in force contain obligations comparable to those in the Optional Protocol for submission of treaty-based disputes to the ICJ.[20] These include bilateral and multilateral treaties involving substantial economic, political, and other interests. The United States is a frequent litigant at the ICJ, both as applicant and as respondent. Indeed, the United States has been involved in more ICJ cases than any other state:[21] in total, the United States has been party to 21 cases at the ICJ,[22] of which 10 have been brought by the United States as applicant or by special agreement and 11 have been brought against the United States.[23] Since each of the 70 treaties with an ICJ dispute settlement clause entails obligations under those treaties and under the U.N. Charter (art. 94) and ICJ Statute (arts. 36(1), 59), failure to carry out *LaGrand* and *Avena* could prejudice the ability of the United States to hold other states to their

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[20] *See* Fred L. Morrison, *Treaties as a Source of Jurisdiction, Especially in U.S. Practice, in* THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS 58-81 (Lori F. Damrosch ed., 1987) [CROSSROADS]. To the best of *Amici*'s knowledge, with only three exceptions (see below) all such treaties remain in force for the United States as of 2005, as specified for each such treaty in the Department of State publication, TREATIES IN FORCE. Two treaties with ICJ clauses came into force for the United States after completion of the Morrison study: the Convention on the Physical Protection of Nuclear Materials, T.I.A.S. No. 11080 (in force Feb. 8, 1987), and the International Convention on the Taking of Hostages, T.I.A.S. No. 11081 (in force Jan. 6, 1985).

In 1985 the United States gave notice of termination of jurisdiction under the optional clause of Article 36(2) of the ICJ Statute and of a treaty of friendship with Nicaragua (the bases of jurisdiction on which the ICJ had relied in the *Nicāragua* case, note 25), and in 2005 gave notice of withdrawal from the Optional Protocol under the Vienna Convention. (Section II.C.)

[21] For a listing of all ICJ cases grouped by state, see the ICJ website at www.icj-cij.org.

[22] The United States has also taken part in almost all proceedings for advisory opinions under Article 65 of the ICJ Statute. *See* Goler Teal Butcher, *The Consonance of U.S. Positions with the International Court's Advisory Opinions, in* CROSSROADS at 423; for a current listing, see ICJ Website.

[23] The cases initiated by the United States include seven involving Soviet-bloc aerial incidents, as well as *Tehran Hostages* (Iran 1979-81), *Gulf of Maine* (Canada 1981-84), and *Elettronica Sicula S.p.A. (ELSI)* (Italy 1987-89). *See* pp. 17-18 below.

dispute settlement obligations and to sustain U.S. credibility before the ICJ in future proceedings. While not all of these treaties are self-executing or confer individual rights subject to judicial protection, the Vienna Convention is indeed a treaty contemplating domestic judicial implementation in favor of individuals as confirmed in *Avena*, and this Court should therefore ensure that state courts fulfill those treaty rights in accordance with the ICJ's interpretation.

The United States has a major stake in maintaining a record of abiding by the outcome of ICJ dispute settlement, since it continues to be active in that forum. Compliance with ICJ final judgments has generally been high, including in the cases in which the United States has been a party.[24] States have exceptionally disregarded ICJ rulings when they considered that the ICJ lacked a proper consensual foundation to decide the case, notably where respondents insisted that the ICJ had been granted no competence to decide a matter involving a state's vital security interests.[25] In the Vienna Convention cases, jurisdiction was by consent and no security interest would be prejudiced by compliance. Indeed, President Bush's memorandum on compliance with *Avena* (Section III) confirms the national interest in fulfilling international obligations.

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[24] Recent studies find compliance with two-thirds of the ICJ's substantive judgments and as high as 80% compliance with final judgments over a substantial period. *See* Colter Paulson, *Compliance With Final Judgments of the International Court of Justice Since 1987*, 98 AM. J. INT'L L. 434, 456-460 (2004) (compliance rate of 60% with judgments issued in last 15 years; likelihood that rate would go up to 80% rate for prior periods in light of efforts to comply over time); Tom Ginsburg & Richard H. McAdams, *Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution*, 45 WM. & MARY L. REV. 1229, 1308-1311 (2004) (overall compliance rate of 68%, counting disregard of provisional measures as noncompliance); Jonathan I. Charney, *Disputes Implicating the Institutional Credibility of the Court*, *in* CROSSROADS at 288, 310-319 (only 5 cases of noncompliance with final judgments 1946-1986).

[25] See especially the U.S. position on *Military and Paramilitary Activities in and against Nicaragua* (Nic. v. U.S.), 1986 ICJ 14, note 34 below. France denied the existence of proper ICJ jurisdiction in *Nuclear Tests* (Austl. & N.Z. v. Fr.), 1974 ICJ 253, 457. The United States and France reacted to these cases by withdrawing from the general compulsory jurisdiction clause of Article 36(2) of the ICJ Statute, while maintaining treaty-based acceptances under Article 36(1).

Implementation of ICJ judgments has proceeded smoothly in almost all treaty-based cases and those involving the rights of aliens within a state's territory. In the first case leading to a final judgment involving the United States, both the United States and France promptly complied with the judgment in *Rights of Nationals of the United States of America in Morocco* (Fr. v. U.S.), 1952 ICJ 176.[26] In *Gulf of Maine* (Canada/U.S.), 1984 ICJ 246, the final judgment drew a maritime boundary; both sides accepted the judgment and promptly complied.[27] In *ELSI*, 1989 ICJ 15, the United States embraced the ICJ forum as part of its diplomacy and accepted the judgment as dispositive of the claims it had raised on behalf of U.S. investors.[28] Thus, apart from *Nicaragua* (addressed in note 34 below) and such continuing problems as may exist in the wake of *LaGrand* and *Avena*, the United States has complied with all final ICJ judgments addressed to it and has benefited from the compliance of all of its adversaries with final judgments

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[26] The final judgment in *Morocco* had elements requiring implementation by each side. The United States dismissed all cases before U.S. consular courts in Morocco that were outside the limits of jurisdiction specified by the ICJ, and French courts relied on the judgment in local (Moroccan) and appellate rulings (by the *Cour de cassation*), which referred to the ICJ judgment as dispositive. *See* Manley O. Hudson, *The Thirty-First Year of the World Court*, 47 AM. J. INT'L L. 1, 8, 14-15 (1953); Note, *Judicial Decisions: Morocco–Criminal Jurisdiction over U.S. Citizens– ... –International Court of Justice*, 49 AM. J. INT'L L. 263, 267 (1955); CHRISTOPH C. SCHREUER, DECISIONS OF INTERNATIONAL INSTITUTIONS BEFORE DOMESTIC COURTS 33-34, 199, 221 n. 100 (1981) (French courts "do not seem to have regarded any domestic implementing measures for the application of the International Court's judgment as being necessary;" direct application of decision derived from French submission to ICJ jurisdiction).

[27] Compliance having been assumed, only a few cases refer to the ICJ judgment. *See, e.g., Conde v. Starlight I Inc.*, 103 F.3d 210 (1st Cir. 1997) (Hague Line mentioned); *Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries and Oceans)*, [1992] 3 F.C. 54 (Can. Fed. Ct.), *rev'd*, [1995] 2 F.C. 467, *aff'd*, [1997] 1 S.C.R. 12 (plaintiff sought fishing license in area awarded to Canada by ICJ); *Mersey Seafoods Ltd. v. Minister of Nat'l Revenue*, [1985] 2 C.T.C. 2485 (Can. Tax Ct.), paras. 142-147 (ICJ decision became available after arguments concluded).

[28] *See* Terry D. Gill, *International Court of Justice – Diplomatic Protection – U.S.-Italian Treaty of Friendship, Commerce and Navigation*, 84 AM. J. INT'L L. 249, 257 (1990).

addressed to them, except for Iran in the *Tehran Hostages* case.[29] In view of the U.S. interest in credible fulfillment of dispute settlement undertakings,[30] this Court should ensure that the

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[29] In addition to the cases discussed in the text, the disposition of the remainder of the 21 cases to which the United States has been party is as follows:

Dismissal on Threshold Ground (No Jurisdiction or Claim Inadmissible): The seven Soviet-bloc *Aerial Incident* cases were dismissed for lack of jurisdiction. 1954 ICJ 99 (U.S. v. Hung.); 1954 ICJ 103 (U.S. v. USSR); 1956 ICJ 6 (U.S. v. Cz.); 1956 ICJ 9 (U.S. v. USSR); 1958 ICJ 158 (U.S. v. USSR); 1959 ICJ 276 (U.S. v. USSR); 1960 ICJ 146 (U.S. v. Bulg.). *Monetary Gold Removed from Rome in 1943* (Italy v. Fr., U.K., U.S.), 1954 ICJ 19, was dismissed for lack of an indispensable party. *Interhandel* (Switz. v. U.S.), 1959 ICJ 16, was dismissed for failure to exhaust local remedies. *Legality of Use of Force* (Yugo. v. U.S.), 1999 ICJ 916, was dismissed for lack of jurisdiction.

Dismissal Upon Settlement: *Aerial Incident of 3 July 1988* (Iran v. U.S.), 1996 ICJ 9, was discontinued after the United States agreed to make an *ex gratia* payment. *Lockerbie (Questions of Interpretation and Application of the 1971 Montreal Convention)* (Libya v. U.S.), 2003 ICJ 152, was discontinued upon an overall settlement. *Vienna Convention on Consular Relations* (Para. v. U.S.), 1998 ICJ 426, was discontinued after provisional measures and before the merits.

Dismissal on Merits: *Oil Platforms* (Iran v. U.S.), 2003 ICJ 161, was dismissed on the merits of both Iran's claim and the U.S. counterclaim.

[30] On rare occasions of U.S. failure to implement obligations resulting from dispute settlement (as with prolonged noncompliance with the *Chamizal* arbitral award in Mexico's favor), detriments to U.S. economic and political interests are well-documented. *See* SHELDON B. LISS, A CENTURY OF DISAGREEMENT: THE CHAMIZAL CONFLICT, 1864-1964 68-69, 75-77, 86-88, 100-101 (1965); ANTONIO GÓMEZ ROBLEDO, MÉXICO Y EL ARBITRAJE INTERNACIONAL 161 (1965); Percy Don Williams, Jr., *Fifty Years of the Chamizal Controversy – A Note on International Arbitral Appeals*, 25 TEX. L. REV. 455, 461-462 (1947) (problems in negotiating with Mexico over expropriation of U.S. properties, in view of noncompliance with *Chamizal* award); FRANCIS J. WEBER, THE UNITED STATES VERSUS MEXICO: THE FINAL SETTLEMENT OF THE PIOUS FUND 42-50 (1969) (linkage between U.S. rejection of *Chamizal* and Mexico's suspension of payments under *Pious Fund* award). President Kennedy said that because of the U.S. refusal on *Chamizal*, "Mexico has been unwilling to take any other matter to arbitration, which has, of course, therefore lessened the harmony between the two countries." *See Kennedy Says U.S. Was Wrong in Mexico Border Disagreement*, N.Y. TIMES, Jul. 6, 1962, at 4, 8.

At the time of the eventual Chamizal settlement in 1963, the office of the Texas Attorney General concurred with the opinion of the Legal Adviser

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courts below uphold the U.S. obligations to carry out the ICJ's treaty interpretation.

This Court has recognized that when the United States undertakes to participate in international dispute settlement, the good faith of the United States is implicated in carrying out the result. *See La Abra Silver Mining Co. v. United States*, 175 U.S. 423, 463 (1899). In *Dames & Moore v. Regan*, 453 U.S. 654, 679-680 (1981), this Court explained that claims by nationals of one country against another can be "sources of friction" in international relations and that dispute settlement procedures accepted by the U.S. political branches are a traditional and proper method for resolving such grievances. Implementation of *LaGrand* and *Avena* is thus consistent with established jurisprudence in respect of international dispute settlement.

C. Withdrawal From The Optional Protocol Does Not Affect The U.S. Obligation To Abide By The Vienna Convention As Interpreted In *LaGrand* And *Avena*.

On March 7, 2005, the U.S. Secretary of State notified the U.N. Secretary-General that the United States "hereby withdraws" from the Optional Protocol. Under international law, this notice could not affect obligations incurred or judgments rendered while the United States was a party to the Protocol. More important for the present case, at the same time as the announcement of withdrawal from the Protocol, the United States reaffirmed its commitment to the Vienna Convention as well as its decision to comply with the *Avena* judgment.[31] It is therefore essential that domestic courts, including this Court, uphold the Convention correctly and

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of the U.S. Department of State that the matter could be resolved with Mexico by treaty without Texas's consent, because of its international implications. *See* Liss at 95-97; 3 Whiteman at 680, 696-699.

[31] The State Department spokesman said (in response to a question): "[T]he bottom line is we believe in the international system, we are committed participants in the international system, as reflected by our continued commitment to the Vienna Convention and its provisions, as well as our decision to comply with the judgment." Dep't of State Daily Press Briefing (Mar. 10, 2005), *at* http://www.state.gov/r/pa/prs/dpb/2005/43225.htm.

implement it according to the interpretation established before the U.S. withdrawal.

D. The Vienna Convention As Interpreted In *LaGrand* And *Avena* Binds The Courts And Is To Be Implemented Through Judicial Action.

LaGrand and *Avena* clarify treaty obligations of the United States which are the supreme law of the land (U.S. Const. art. VI) and binding on all state courts, and the legal obligations of the United States to abide by the interpretations in those cases likewise arise from binding treaty undertakings. Hence, on the current petitions, the interpretations in *LaGrand* and *Avena* provide the basis for the rule of decision which this Court should instruct state courts to follow.

The Senate approved the obligations of the Vienna Convention and ICJ compulsory jurisdiction over disputes under it when it gave unanimous advice and consent to ratification of the Vienna Convention and the Optional Protocol. *See* 115 Cong. Rec. 30997 (Oct. 22, 1969).[32] The Vienna Convention has been understood at all times to be a self-executing treaty.[33] Likewise, there has never been the slightest doubt that the Vienna Convention would prevail over any inconsistent state law. The priority of treaty law over state law as required by the Supremacy Clause was spelled out explicitly in the State Department's responses to the Senate's questions:

> *Question. What is the effect of the convention on (a) Federal legislation; and (b) State laws?*
>
> Answer [after explaining a possible area of conflict not relevant here].
>
> To the extent that there are conflicts with Federal legislation or State laws the Vienna

[32] *See* RESTATEMENT (Third) of the Foreign Relations Law of the United States (1987), Intro. Note to Part III and §§ 301-312, 321; Intro. Note to Part IV, ch. 6 (before § 464); § 465.

[33] The Department of State witness informed the Senate: "The Convention is considered entirely self-executive and does not require any implementing or complementing legislation." Statement of J. Edward Lyerly, Deputy Legal Adviser for Administration, U.S. Department of State, Before the Senate Committee on Foreign Relations, reprinted in Sen. Exec. Rep. No. 91-9, 91st Cong., 1st Sess. (1969), at 5. *See also* RESTATEMENT, Intro. Note before § 464.

> Convention, after ratification, would govern as in the case of bilateral consular conventions.

Sen. Exec. Rep. No. 91-9, at 18. This official response about the controlling effect of the Vienna Convention raised no concerns in the Senate, which gave unanimous advice and consent.

Because *LaGrand* and *Avena* specify what is required by the Vienna Convention itself as a remedy for breaches, all aspects of the present petitions are properly understood as implementation of self-executing treaty obligations.[34] Just as no legislation was required to implement the treaty obligation to inform foreign nationals of their consular rights, no further action from the federal political branches is needed to afford petitioners the treaty-based judicial hearing that the ICJ has found to be necessary to redress violations of this right.[35] *LaGrand* and *Avena* clarify obligations that existed when petitioners were arrested (the obligation to inform them of their treaty rights) and subsequently when they were tried, convicted, and sentenced (the treaty-based obligation to review the effect of the violation of the duty to inform and to accord an effective remedy). The procedure prescribed is well within

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[34] *Committee of United States Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 937-938 (D.C. Cir. 1988), suggests in dicta that an ICJ judgment might not be self-executing, but is distinguishable. The ICJ's *Nicaragua* judgment did not involve a self-executing treaty, but rather entailed aspects of international law (use of military force) that are non-self-executing in U.S. law. The plaintiffs who sought to enforce the *Nicaragua* judgment were strangers to the ICJ case, *see* 859 F.2d 938, while *Avena* explicitly deals with petitioners' situation and specifies the remedy for their claims under a self-executing treaty. Finally, Congress and the President had repudiated the *Nicaragua* judgment in a subsequent conflicting statute, which the court of appeals found controlling, *see* 859 F.2d 936-937. Here, no statute rejects *Avena*, and the President has formally endorsed compliance through state courts. *See* Section III.

[35] In *Sosa v. Alvarez-Machain*, 542 U.S. 692, 728, 735 (2004), this Court distinguished between rights under a treaty that the political branches have declared to be non-self-executing, and those under a self-executing treaty. Judicial enforcement of self-executing treaties is to be expected, and the same should follow for authoritative interpretations of self-executing treaties. Since the political branches have consistently treated the Vienna Convention as self-executing, *Sosa*'s reasoning favors enforcement of petitioners' treaty rights in state courts.

judicial competence to review and correct illegal acts in connection with criminal trials.

In failing to give petitioners the consular notice required by the Vienna Convention, authorities in Oregon and Virginia placed the United States in violation of its treaty obligations. The ICJ has held that an apology cannot suffice to remedy such violations in cases like those of petitioners involving "severe penalties." *See LaGrand*, para. 123; *Avena*, para. 120; Section I.B, I.D. The reparation required by the treaty is a judicial hearing for review and reconsideration of the conviction and sentence of petitioners and other similarly situated foreign nationals. Petitioners seek concrete vindication of a treaty-based right that the ICJ has found to require an effective judicial remedy. Failure to accord this treaty remedy would leave the United States in continuing violation of its obligation to ensure compliance with the Vienna Convention.

There can be no objection that *Avena* calls upon the United States to alter the way in which state criminal jurisdiction would be exercised.[36] Treaties often require states to modify the exercise of jurisdiction, and even to refrain from criminal jurisdiction. For example, the Vienna Convention (arts. 41-45)

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[36] If U.S. states were free to violate and then fail to remedy treaty violations, with no judicial remedy available, the United States as a whole would be responsible for state violations of international law. This Court has repeatedly affirmed the need to undertake a "searching scrutiny" of state or local actions affecting U.S. foreign relations that may provoke consequences for the nation as a whole. *See, e.g., Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 451 (1979). The United States has accepted obligations to make reparations in respect of failure of state or local authorities to protect foreign nationals in accordance with international standards. *See* RESTATEMENT § 207, Reporters' Note 3. Where state courts can avoid such violations by carrying out the judgment of an authoritative international tribunal, they must do so.

In the early 20th century, in preparation for arbitration with Mexico involving protection of nationals of one country in the other's territory, State Department lawyers sought instructions on how to deal with legal issues concerning actions of states of the Mexican federation, in light of mirror-image considerations of U.S. federalism. The Department replied that "in our dealings with foreign Governments having a federal system similar to our own, we have invariably insisted on the liability of the Federal Government." 5 Hackworth 593, 597 (1943).

codifies the international law of consular immunity from criminal jurisdiction. Where a treaty provides for immunity of a foreign official, courts are required to recognize immunity, notwithstanding any impact on law enforcement interests. *See Commonwealth v. Jerez*, 390 Mass. 456, 457 N.E.2d 1105 (1983) (criminal complaint against consul dismissed because of Vienna Convention). *Cf. In re Dillon*, 7 Fed. Cas. 710 (No. 3914) (N.D. Cal. 1854) (recognizing treaty immunity of consul from defendant's subpoena in a criminal case, notwithstanding constitutional guarantee of compulsory process to obtain witnesses).

The obligation of state judges to give effect to treaty-based rights of foreigners is beyond doubt. In *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 236-237 (1796), this Court established that a treaty with Britain would prevail over state laws confiscating the property of British subjects:[37]

> [I]t is the declared duty of the State Judges to determine any Constitution, or laws of any State, contrary to the treaty (or any other) made under the authority of the United States, null and void. National or Federal Judges are bound by duty and oath to the same conduct.

State courts have frequently upheld treaty rights in cases coming within their jurisdiction, without awaiting any instruction from the federal Executive or the legislature.[38]

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[37] *See also Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 603 (1813) (treaty protected British property owners against forfeiture under state law). Treaties providing inheritance rights for aliens have been held to prevail over state laws. *See Hauenstein v. Lynham*, 100 U.S. 483 (1880); *Nielsen v. Johnson*, 279 U.S. 47 (1929); *Clark v. Allen*, 331 U.S. 503 (1947); *Kolovrat v. Oregon*, 366 U.S. 187 (1961). State prohibitions on land ownership have likewise had to yield to treaties. *Chirac v. Chirac*, 15 U.S. (2 Wheat.) 259 (1817). In *Asakura v. Seattle*, 265 U.S. 332 (1924), this Court said: "The treaty is binding within the State of Washington. ... It operates of itself without the aid of any legislation, state or national; and it will be applied and given authoritative effect by the courts." 265 U.S. at 341.

[38] The Court of Appeals of Kentucky, in an opinion that this Court called "very able" (*United States v. Rauscher*, 119 U.S. 407, 427-28 (1886)), wrote in a treaty case:

> When it is provided by treaty that certain acts shall not be done, or that certain limitations or restrictions shall not be

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Indeed, state courts have regularly applied consular treaties on a self-executing basis. *See, e.g., In re Zalewski*, 292 N.Y. 322 (1944) (holding a consular treaty to be supreme law and giving it liberal construction to allow consul to act as agent for Polish national and exercise right of election under will).

Where the Senate unanimously approved a treaty designed to secure rights of Americans around the world and the ICJ has required review and reconsideration of convictions and sentences as the remedy for violation, no state court is free to ignore the treaty-based judgment in favor of the foreigner. If Oregon and Virginia were to defeat the national interest in treaty compliance, they would deny to the United States as a whole the benefits of the constitutional design, which makes treaty obligations supreme and requires state courts to enforce them.[39]

III. This Court Should Treat *LaGrand* And *Avena* As The Basis For The Rule Of Decision For State Courts, Without Regard To Executive Branch Positions Incompatible With The ICJ's Interpretation.

A. *LaGrand* And *Avena* Establish The Basis For The Rule Of Decision Applicable In All Vienna Convention Cases Involving "Severe Penalties."

Although *LaGrand* and *Avena* were brought on behalf of death row inmates, Vienna Convention obligations are not

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> disregarded or exceeded by the contracting parties, the compact does not need to be supplemented by legislative or executive action, to authorize the courts of justice to decline to override those limitations or to exceed the prescribed restrictions, for the palpable and all-sufficient reason, that to do so would be not only to violate the public faith, but to transgress the "supreme law of the land."

Commonwealth v. Hawes, 76 Ky. (13 Bush) 697, 702-03 (1878).

[39] In *Hines v. Davidowitz*, 312 U.S. 52 (1941), this Court emphasized:

> One of the most important and delicate of all international relationships, recognized immemorially as a responsibility of government, has to do with the protection of the just rights of a country's own nationals when those nationals are in another country. . . . – duties which our State Department has often successfully insisted foreign nations must recognize as to our nationals abroad.

312 U.S. at 64-65.

limited to capital crimes, nor does the obligation to afford a remedy for treaty violations apply only in capital cases. The import of *LaGrand* and *Avena* extends beyond the two LaGrand brothers and the 51 named individuals in *Avena*: *LaGrand* and *Avena* have stated an authoritative interpretation of the underlying treaty which establishes the rule for deciding comparable questions under the same treaty henceforth. (Section I.D.)

Amici understand the position of respondents to be that by virtue of Article 59 of the ICJ Statute,[40] *LaGrand* and *Avena* are not binding in respect of Mr. Sanchez-Llamas (whose case was not before the ICJ in *Avena*) or Mr. Bustillo (whose country has not participated in ICJ dispute settlement under the Optional Protocol). The United States as *amicus curiae* in *Medellin* took positions that would confine the international legal obligation flowing from *Avena* to the specific dispositive provisions of that judgment, and the domestic legal obligation to President Bush's memorandum on compliance with *Avena*.[41] These litigation positions misconstrue the nature of ICJ adjudication in cases of treaty interpretation and fail to recognize the authority attaching to ICJ decisions, not only in the jurisprudence of that body, but also for national courts.

Article 59 of the ICJ Statute reflects the well-understood position that the ICJ does not have a formal rule of *stare decisis*, while affirming the *res judicata* effects of the judgment in respect of the matter decided. Even without *stare decisis*, the reality is that once the ICJ has decided the merits of a question of international law, that decision is authoritative when corresponding questions arise later on. The ICJ "has, indeed, never expressly departed from a previous

[40] Article 59 provides: "The decision of the Court has no binding force except between the parties and in respect of that particular case."

[41] *See* Brief for the United States as Amicus Curiae Supporting Respondent, *Medellin v. Dretke*, 125 S.Ct. 2088, pp. 38-39 n. 12 (on international legal obligation to comply with judgment but not with its reasoning); Brief for the United States as Amicus Curiae, *Ex Parte Medellin* (Ct. Crim. App. TX, Sept. 2, 2005), p. 18 n. 2. Both U.S. amicus briefs take the position that *Avena* has no domestic force except to the extent implemented by the President's memorandum of February 28, 2005. *Amici* respectfully disagree and urge this Court to apply *Avena* as the treaty-based rule of decision, for the reasons set forth herein.

decision."[42] Not only does the ICJ follow its own precedents,[43] but this Court has taken ICJ judgments as authoritative articulations of rules of international law,[44] as have other national tribunals,[45] even in matters concerning internal criminal jurisdiction.[46]

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[42] *See* Maurice Mendelson, *The International Court of Justice and the Sources of International Law*, *in* FIFTY YEARS OF THE INTERNATIONAL COURT OF JUSTICE 63, 81 (Vaughan Lowe & Malgosia Fitzmaurice, eds., 1996); *see also* E.W. Vierdag, *The International Court of Justice and the Law of Treaties*, *in ibid.* at 145, 154 ("great care is always taken to demonstrate the internal consistency of the Court's jurisprudence.").

[43] *See generally* MOHAMED SHAHABUDDEEN, PRECEDENT IN THE WORLD COURT 26-31, 40-47, 63-65, 99-102 (1996) (on jurisprudential basis for ICJ reliance on own precedents); 3 SHABTAI ROSENNE, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT, 1920-1996 1627-1635 (1997) (on precedential effects beyond art. 59).

[44] *See, e.g.*, *United States v. Maine*, 475 U.S. 89 (1986); *United States v. Louisiana*, 470 U.S. 93, 107 (1985); *United States v. Louisiana*, 394 U.S. 11 (1969) (all referring to the *Fisheries* case (U.K. v. Nor.), 1951 I.C.J. 116, as legal authority in a maritime boundary dispute).

[45] *See generally* Sarita Ordonez & David Reilly, *Effect of the Jurisprudence of the International Court of Justice in National Courts*, *in* INTERNATIONAL LAW DECISIONS IN NATIONAL COURTS 335, 352-369 (Thomas M. Franck & Gregory H. Fox eds., 1996) (invocation of ICJ cases by courts in Argentina, Canada, France, Israel, Italy, Japan, the Netherlands, New Zealand, Norway, U.K. and U.S., and colonial and consular courts); *see also* Mohammed Bedjaoui, *The Reception by National Courts of Decisions of International Tribunals*, *in ibid.* at 21, 30-35; CHRISTOPH C. SCHREUER, DECISIONS OF INTERNATIONAL INSTITUTIONS BEFORE DOMESTIC COURTS 33-34, 74, 86, 92, 98, 129-130, 199, 204, 221, 257-258 (1981) (similar).

[46] After the ICJ decision in *Arrest Warrant of 11 April 2000* (D.R. Congo v. Belg.), 2002 ICJ 3, holding that Belgium was required to cancel an arrest warrant for the sitting foreign minister of the Congo, Belgian courts not only cancelled the specific warrant involved in the case but also dismissed proceedings involving high-level officials of other states. Belgium's Supreme Court, acting in a case involving Prime Minister Ariel Sharon of Israel, followed *Arrest Warrant* in finding the head of government to enjoy immunity under international law. *See* Jan Wouters, *The Judgement of the International Court of Justice in the* Arrest Warrant *Case: Some Critical Remarks*, 16 LEIDEN J. INT'L L. 253, 266 (2003); *see also* Alain Winants, *The* Yerodia *Ruling of the International Court of Justice and the 1993/1999 Belgian Law on Universal Jurisdiction*, 16 LEIDEN J. INT'L L. 491, 505-07 (2003) (Belgian court decisions terminating prosecutions in *Yerodia*, *Sharon*, *and Gbagbo* following ICJ ruling altered outcomes from what advocates had expected under preexisting understandings of legal doctrine and legislative intent).

When the ICJ interprets a multilateral treaty, as it has done in *LaGrand* and *Avena*, its decision addresses the objective meaning of the treaty, which necessarily must apply throughout the treaty space and not as some special rule between litigants.[47] In the first case ever brought to the ICJ under the Vienna Convention, *United States Diplomatic and Consular Staff in Tehran* (U.S. v. Iran), the United States insisted - and the ICJ underscored in its judgment - that the import of the case transcended U.S.-Iranian bilateral relations and involved community-wide interests under the treaties involved.[48] In *Avena* (para. 47), the ICJ referred to the *Tehran Hostages* case in the context of affirming that the Vienna Convention "lays down certain standards to be observed by all States parties," and explained later in the judgment (para. 151) that nationals of all states parties are entitled to enjoy the rights and remedies elaborated therein.

B. This Court Should Decide The Meaning And Effect Of The Vienna Convention In Light Of *LaGrand* And *Avena*, Even If That Decision Differs From The Positions Of The Executive Branch.

Up through the merits phase of *Avena*, the United States maintained certain international and domestic litigation positions that have now been definitively rejected in *Avena*. To the extent that the lower courts may have acted on assumptions that are now known to be inconsistent with

[47] *See* Bedjaoui, *supra* n. 45, at 27 ("Going by the rule, Article 59 confines the effects of this interpretation to relations between the litigant States alone. But in reality, it is virtually impossible for all the parties to a multilateral convention (which may even be a universal one) to ignore the Court's interpretation of this convention for long."). *See also* Rosenne, *supra* n. 43, at 1635 (quoting *Aegean Sea Continental Shelf*, 1978 ICJ 3, 16, that "any pronouncement of the Court as to [the 1928 General Act for the Pacific Settlement of Disputes] may have implication in the relations between States other than [the parties]."). Because ICJ interpretations of multilateral treaties inevitably bear upon other treaty parties beyond the specific disputants, Article 63 of the ICJ Statute instructs the ICJ to notify all other parties to the treaty who then can intervene in the case as of right.

[48] *See, e.g.*, 1979 ICJ Pleadings, *United States Diplomatic and Consular Staff in Tehran* (U.S. v. Iran), pp. 11-12, 23-24, 169-170; *United States Diplomatic and Consular Staff in Tehran* (U.S. v. Iran), 1979 ICJ 7, 19-20 (Provisional Measures); 1980 ICJ 3, 42-43 (Merits).

the treaty obligations of the United States, this Court should instruct those courts to follow *Avena* and not to follow any Executive Branch positions incompatible with *Avena*.

President Bush's memorandum on compliance with *Avena* acknowledges the party status of the United States to the relevant treaties and the jurisdiction of the ICJ to decide the dispute; further acknowledges the existence of international obligations for the United States under *Avena*; and provides that compliance in state courts will discharge those obligations. Although the litigation position of the Executive Branch seeks to confine the import of the determination to the 51 individuals covered *Avena*, this Court should recognize that the same treaty-based rule of decision applies in petitioners' cases as well. (Sections I.D, III.A.)

Bearing in mind that the views of the Executive on treaty matters are entitled to deference but are "not conclusive upon a court called upon to construe such a treaty in a manner involving personal rights," *see, e.g., Charlton v. Kelly*, 229 U.S. 447, 468 (1913); *Perkins v. Elg*, 307 U.S. 325 (1939), this Court should endorse the Executive's views that are compatible with protecting foreign nationals in accordance with *Avena* but not follow Executive positions that would give foreign nationals a lesser level of protection than they are entitled to enjoy under *Avena*'s interpretation of the Vienna Convention.[49] This Court has consistently reserved to the judiciary the prerogative of *protecting* the personal rights claimed by individuals under treaties beyond the Executive position and has never been known to *restrict* a treaty right that the Executive has acknowledged or that is otherwise ascertainable as a matter of objective treaty interpretation. *Cf. Factor v. Laubenheimer*, 290 U.S. 276 (1933) (interpretation expanding rather than restricting treaty rights is to be preferred); *Valentine v. United States ex*

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[49] No issue is raised here of deferring to Executive foreign policy, apart from the federal policy favoring treaty compliance in general and compliance with *Avena* in particular. *Cf. Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004); *Republic of Austria v. Altmann*, 541 U.S. 677, 701-701 (2004) (on deference to the Executive for case-specific foreign policy reasons).

rel. Neidecker, 299 U.S. 5, 10-11 (1936) (rejecting claim of Executive power as unsupported by treaty); *Baker v. Carr*, 369 U.S. 186, 212 (1962) (courts must resolve conflicts with state law in favor of treaty compliance).

The jurisprudence of this Court accepts the authority of the federal government to settle disputes with foreign governments in a manner that binds state courts. In *United States v. Belmont*, 301 U.S. 324 (1937), and *United States v. Pink*, 315 U.S. 203 (1942), this Court found that the federal policy of the United States adopted in the context of definitive resolution of disputes with the Soviet Union would displace contrary state law. In *American Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003), this Court confirmed that an executive policy in favor of achieving "legal peace" with foreign governments had to prevail over a state law affecting the jurisdiction of state courts.[50] Whatever might be the limits of federal authority to resolve disputes with foreign governments in some hypothetical scenario not involved here,[51] it falls clearly within the core of federal power under the Constitution to accept the outcome of a treaty-based dispute resolution process as definitively settling a dispute over treatment of foreign nationals by the states and for this Court to ensure that state courts carry out the treaty obligations in question.

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[50] *See also Dames & Moore v. Regan*, 453 U.S. 654, 679-680 (1981) (upholding executive power to settle claims through international dispute mechanism). In *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 383 (2000), this Court invalidated a state law that had embroiled the national government for some time in an international dispute settlement procedure. *A fortiori*, in the face of a binding judgment from treaty-based dispute settlement, a state rule must not impede treaty compliance and a judicial remedy must be available.

[51] No question is presented here of constitutional rules on expenditures from the Treasury, or of statutory restrictions on acceptance of a particular dispute settlement procedure or explicit limitations on the effects of a dispute settlement ruling within the U.S. legal system. *Cf., e.g.*, Uruguay Round Agreements Act, 19 U.S.C. §§ 3501, 3512(b)(2) (restricting legal challenges to state laws in relation to dispute settlement procedures of World Trade Organization).

Ultimately, it is the interpretation of this Court that must have conclusive effect under the Constitution.[52] In interpreting the legal obligations of the United States in the instant case, it would be no mark of disrespect to the Executive Branch, but a justified assertion of the role of this Court consistent with the principle of separation of powers, if the Court, as *Amici* urge, exercises its independent judgment to accept the interpretation embodied in *LaGrand* and *Avena*.

CONCLUSION

Amici urge this Court to ensure that actions and omissions of the States of Oregon and Virginia are remedied by the courts of those States, as proper organs of treaty compliance. Refusal to grant the treaty-based remedy for Vienna Convention violations as determined by the ICJ would undermine the U.S. ability to insist on compliance by other states with their obligations under the Vienna Convention. Review and reconsideration of petitioners' convictions and sentences is necessary to avoid the adverse consequences that would result from failure to comply, which could include prejudice in connection with dispute settlement under other treaties.

By remanding with instructions to afford the remedy of review and reconsideration required to redress the violation of the treaty as interpreted in *LaGrand* and *Avena*, this Court will fulfill its responsibility within our constitutional system and will maintain compliance with the international obligations of the United States.

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[52] *See* Restatement, § 112(2) ("The determination and interpretation of international law present federal questions and their disposition by the United States Supreme Court is conclusive for other courts in the United States") and comment *a*.

Respectfully submitted,

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Appendix

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(22) (6)
FILED
DEC 22 2005
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Nos. 04-10566, 05-51

In the Supreme Court of the United States

MOISES SANCHEZ-LLAMAS
Petitioner,

v.

OREGON

MARIO A. BUSTILLO
Petitioner,

v.

GENE M. JOHNSON,
DIRECTOR VIRGINIA DEPT. OF CORRECTIONS

ON WRITS OF CERTIORARI TO THE SUPREME COURT OF OREGON AND THE SUPREME COURT OF VIRGINIA

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INTEREST OF AMICI CURIAE

Amici curiae respectfully submit this brief addressing the question whether the Vienna Convention on Consular Relations creates individually enforceable rights. Amici are professors of law whose areas of expertise include international law, federal courts, and U.S. foreign relations law. We have an interest in providing this Court with an historical perspective on the judicial enforcement of treaties in U.S. courts. Amici are listed in the appendix to this brief.[1]

SUMMARY OF ARGUMENT

Article 36(1) of the Vienna Convention on Consular Relations (VCCR) protects the primary rights of individuals. Under the Supremacy Clause, state courts are bound to enforce the treaty on behalf of individuals whose primary rights are violated. Analysis of Supreme Court decisions in the first forty years of U.S. constitutional history shows that the Framers believed that courts do not need express authorization from the political branches to provide individual remedies for violations of treaty rights. In accordance with the Framers' original understanding, individual defendants like Mr. Sanchez-Llamas have the capacity to invoke a treaty before a domestic court if they were harmed by a violation of their treaty-based primary rights, even if the treaty at issue is silent with respect to domestic judicial remedies. Similarly, individual plaintiffs have the capacity to invoke a treaty before a domestic court if domestic law grants them a right of access to court (as the

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[1] The parties' letters of consent to the filing of amici briefs have been lodged with the Clerk. Pursuant to Rule 37.6 of the Rules of the Court, amici curiae state that no counsel for a party has written this brief in whole or in part and that no person or entity, other than amici, their members, or their counsel, has made a monetary contribution for preparing or submitting this brief.

Virginia habeas statute does for Mr. Bustillo) and they were harmed by a violation of their treaty-based primary rights, even if the treaty at issue is silent with respect to domestic judicial remedies.

In *State v. Sanchez-Llamas*, the Oregon Supreme Court adopted a presumption that individual litigants cannot obtain remedies for treaty violations unless the treaty itself creates a private right of action. That presumption is contrary to the Framers' original understanding of the judiciary's role in treaty enforcement. Between 1789 and 1829, this Court decided 34 cases in which an individual litigant raised a claim or defense on the basis of a treaty. In every case where the Court found a violation of an individual's treaty-based primary right – a total of 18 cases – the Court granted a remedy. In two of those 18 cases, the individual sued to enforce a treaty that created an express private right of action. In the other 16 cases, though, the Court awarded a remedy even though the treaty at issue did not create a private right of action. This consistent pattern of Supreme Court decisions during the first forty years of U.S. constitutional history provides powerful evidence of the Framers' views. These cases demonstrate that the presumption adopted by the Oregon Supreme Court is contrary to the Founders' original understanding of the judiciary's role in treaty enforcement.

The Oregon Supreme Court's presumption against judicial remedies for treaty violations is also squarely at odds with two centuries of consistent Supreme Court jurisprudence. For more than two hundred years, this Court has consistently granted judicial remedies in cases where a treaty protects an individual's primary rights and those treaty rights have been violated. In fact, this Court has never denied a judicial remedy to an individual whose treaty rights

were violated, except in cases where Congress enacted a statute that superseded the treaty under the later-in-time rule.

There is no dispute that Article 36 of the VCCR is the Law of the Land under the Supremacy Clause. Moreover, it is evident from the plain meaning of Article 36 that the treaty protects the primary rights of individuals. Therefore, this Court should hold that any individual who has been harmed by a violation of his primary rights under Article 36 is entitled to a judicial remedy for that violation, except insofar as amendments to the federal habeas statute enacted after ratification of the VCCR may preclude the availability of federal habeas relief for some petitioners who would otherwise be entitled to a judicial remedy.

ARGUMENT

I. DECISIONS IN TREATY CASES FROM 1789 TO 1829 SUPPORT A STRONG PRESUMPTION IN FAVOR OF JUDICIAL REMEDIES FOR VIOLATIONS OF INDIVIDUAL TREATY RIGHTS

Treaties frequently create primary rights for individuals. For the purpose of this brief, an individual has a "primary right" under a treaty if a state party to the treaty has a legal duty under the treaty to behave in a particular way, or to refrain from behaving in a particular way, with respect to that individual. *See generally* Henry M. Hart, Jr. & Albert M. Sacks, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (Eskridge & Frickey, eds. 1994), at 130-31 (defining primary duties), and at 136-37 (noting that a "primary right" is "the mere obverse" of a duty). Treaties rarely, though, explicitly address the question whether individuals have a private right of action – that is, a right of access to domestic courts. Similarly, treaties usually

do not explicitly address the question whether individuals have the power to invoke the treaty before a domestic court.

The Oregon Supreme Court assumed that individuals cannot enforce their primary rights under the VCCR unless the Convention itself creates a private right of action. *See State v. Sanchez-Llamas*, 108 P.3d 573, 575-78 (Or. 2005). That assumption is clearly mistaken. In the statutory context, the Administrative Procedure Act (APA) creates a private right of action that authorizes individual suits to enforce federal statutes that do not themselves create a private cause of action. *See, e.g., Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 61 (2004) (where plaintiffs sued to enforce a statute that did not create a private right of action, Justice Scalia, writing for a unanimous court, held that "[t]he APA authorizes suit" for federal statutory violations "[w]here no other statute provides a private right of action"). Similarly, Virginia's habeas corpus statute grants Mr. Bustillo a private right of action to advance his claim "that he is detained without lawful authority," Va. Code § 8.01-654, and the Supremacy Clause requires the Virginia courts to apply the VCCR as a rule of decision to decide the merits of that claim. (Since Mr. Sanchez-Llamas is a defendant in a criminal proceeding, the question of a right of action does not arise because he was haled into court against his will.)

Between 1789 and 1829, this Court consistently granted remedies to individuals who were harmed by violations of their treaty-based primary rights, despite the fact that the treaties at issue did not create private rights of action and did not expressly empower individuals to invoke the treaties before a domestic court. During this period, the Court decided 34 cases in which an individual litigant raised

a claim or defense on the basis of a treaty.[2] All 34 cases are consistent with the following rule: if an individual was harmed by a past violation of his primary treaty rights, or if he is likely to be harmed by a future violation of those rights, then the individual is entitled to a judicial remedy, even if the treaty itself does not create a private right of action, and even if the treaty says nothing about the capacity of individuals to invoke the treaty before a domestic court. This rule is a corollary of the principle endorsed by the Supreme Court in *Marbury v. Madison* "that where there is a legal right, there is also a legal remedy . . . whenever that right is invaded." 5 U.S. 137, 163 (1803) (quoting Blackstone's Commentaries). If a particular treaty provision is the Law of the Land under the Supremacy Clause, and that provision protects primary individual rights, the *Marbury* principle establishes a strong presumption that individuals who are harmed by a violation of their treaty-based primary rights are entitled to domestic judicial remedies. *See Owings v. Norwood's Lessee*, 9 U.S. 344, 348 (1809) (Marshall, C.J.) ("Each treaty stipulates something respecting the citizens of the two nations, and gives them rights. Whenever a right grows out of, or is protected by, a treaty, it is sanctioned against all the laws and judicial decisions of the states; and whoever may have this right, it is to be protected.").

Part One of this brief demonstrates that all 34 treaty cases decided by the Supreme Court between 1789 and 1829 are consistent with the *Marbury* principle. These consistent precedents in the Framing Period provide particularly powerful evidence of the Framers' views concerning the judiciary's role in the enforcement of treaties. This Court has emphasized that the force of constitutional precedents "tends

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[2] This figure does not include cases involving treaties with Indian tribes.